

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1323

To be argued by
BARRY BASSIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
: UNITED STATES OF AMERICA, :
: Plaintiff-Appellee, :
: -against- :
: ROTHWELL REDDICK, :
: Defendant-Appellant. :
-----X

B
PBS
Docket No. 77-1323

APPENDIX FOR APPELLANT
ROTHWELL REDDICK

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Appellant
ROTHWELL REDDICK
FEDERAL DEFENDER SERVICES UNIT
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BARRY BASSIS,
Of Counsel.

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REDDICK, ROTHWELL

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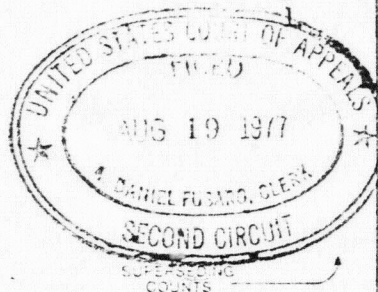
U.S. DISTRICT SECTION

18:1708

OFFENSES CHARGED

Possession of stolen mail

ORIGINAL COUNTS



U.S. MAG. CASE NO. 77-152

BAIL • RELEASE

☐ AMT ☐ Fugitive
☐ Set ☐ Pers Recog
☒ PSA

☐ 10% Deposit
☐ Surety Bond
☐ Collateral
☒ 3rd
☐ Other

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began * 2/8/77	High Risk Date 4-7-77	4-14-77	Trial Set For Voor Dire ☐	Disposition of Charges 6-24-77
Summons Served	Indict. Waived ☐	1st Plea 4-14-77	Trial Began ☒ J 6-21-77	☐ On All Charges
First Appearance	Superseding ☐ Indict/Info ☐	Final Plea	Trial Ended 6-24-77	☐ On Lesser * Offenses
	In Charging District			☐ Dismissed: ☐ WOP: ☐ WP
				☐ On Government's Motion

SEARCH WARRANT	DATE	INITIAL/NO	INITIAL APPEARANCE DATE	INITIAL/NO	OUTCOME
Issued	2/9/77	KS-08AK	2/9/77	KS-08AK	DISMISSED
Returned			3/1/77		HELD FOR GO OR OTHER PROCEEDING IN THIS DISTRICT
Summons Issued					HELD FOR GO OR OTHER PROCEEDING IN THIS DISTRICT
Summons Served					
Arrest Warrant Issued					
COMPLAINT	2/9/77	KS-08AK			
OFFENSES	18 USC 1708 - POSSESSION OF STOLEN MAIL				

U.S. Attorney or Asst.

Howard W. Goldstein
791-0011

ATTORNEYS

Roland Thau, Federal Defender Services Unit

- 461

DATE	DOCUMENT NO.	PROCEEDINGS	DELAY
2/9/77		Complaint filed, Legal Aid assigned. Defendant released on his own recognizance.	
4-7-77		INDICTMENT FILED, 77 CR 247Lasker, J.	
4-14-77		Deft. (atty. Roland Thau present). No appearance by deft. Court directs a not guilty plea be entered. B/W Ordered. Case assigned to Frankel, J. for all purposes....Lasker, J.	
4-18-77		Filed BENCH WARRANT, ISSUED.	
5-16-77		Filed Warrant for Arrest of Deft. returned unexecuted.	
5-26-77		Filed papers rec'd from the Mag's Office: Docket Sheet and Disposition Sheet.	
6-21-77		Jury trial commenced, Atty Roland Thau pres.	
6-22-77		Trial cont'd.	
6-23-77		" "	
6-24-77		" " and concluded. Jury returns a verdict of GUILTY P.S.I. ordered. Sentenceing @ 9:30 A.M., on 7-27-77. R.O.R. FRANKEL, J.	

Cont'd on page 2

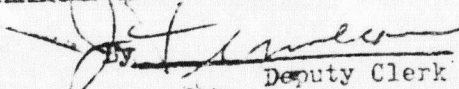
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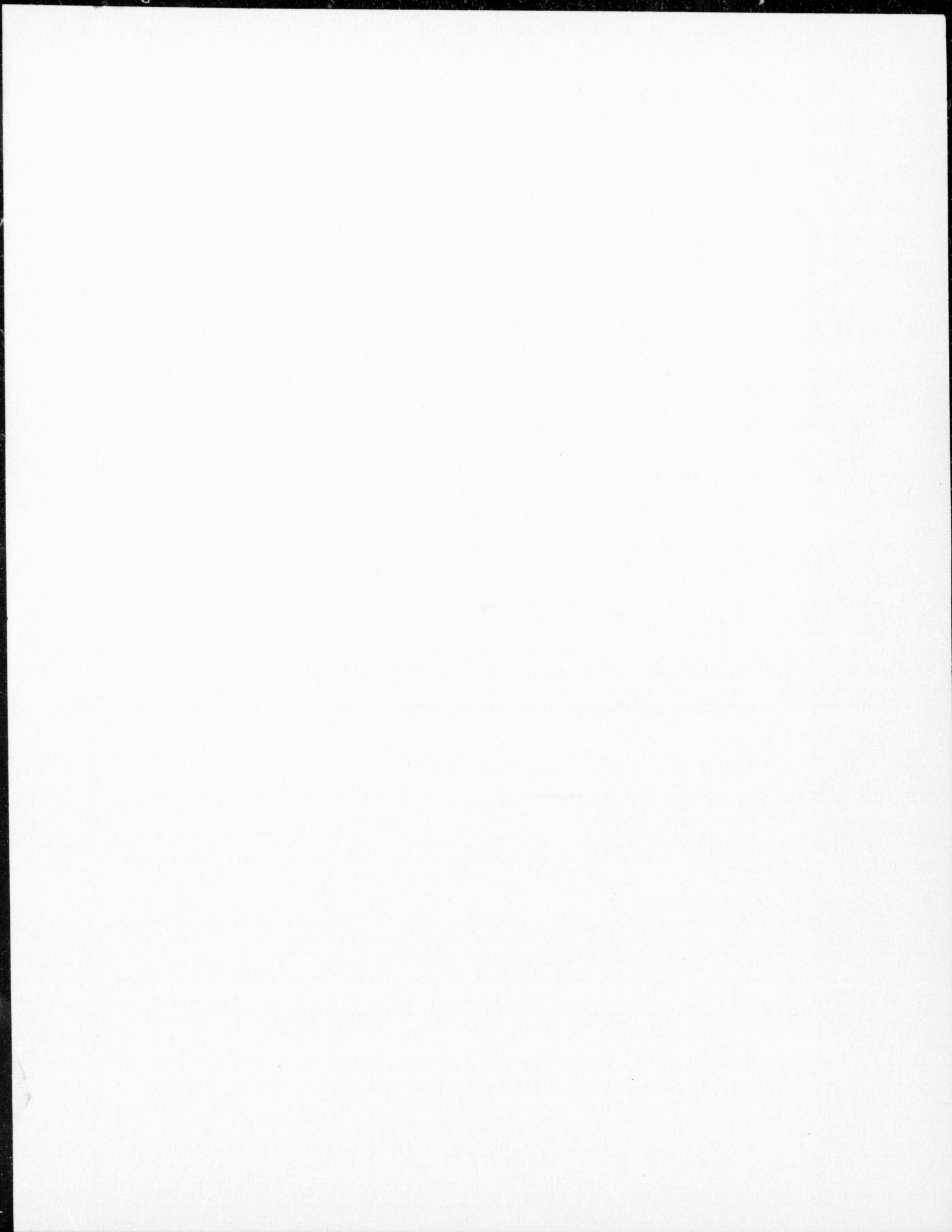
DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUSABLE DELAY
7-5-77	Filed Deft's Requests to charge.		
7-5-77	Filed Govt's Requests to charge.		
7-5-77	Filed Govt's proposed examination of prospective jurors.		
7-5-77	Filed Govt's Memorandum in support of admission of evidence of prior similar acts.		
7-27-77	Filed JUDGMENT AND PROBATION/COMMITMENT ORDER - the deft is committed to the custody of the Atty Gen for/impr for a period of FIVE (5) YEARS. Pursuant to Sec. 3651 Title 18 U.S. Code, deft is to be confined in a Jail Type Institution for a period of Five (5) MONTHS. Remainder of Sentence is suspended and deft is placed on probation for a period of TWO (2) YEARS which is to commence upon release from confinement and subject to the standing probation order of the court. Deft released on his own recognizance until 10:30 A.M. 8-3-77 which time he is to surrender to the U.S. Marshal. FRANKEL, J. (all copies issued)		
8-1-77	Filed Deft's NOTICE OF APPEAL to the USCA from the order of the District Court filed 7-27-77. Mailed Notices to the U.S. Atty and the counsel for the appellant.		
8-8-77	FILED COMMITMENT & MARSHAL'S RETURN.		

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	CD NUMBER	DATE	RECEIPT NUMBER	CD NUMBER

A TRUE COPY
RAYMOND R. BURGHARDT, Clerk

By  Deputy Clerk



HWG:mkb
77-0431

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA, :

-v- :

ROTHWELL REDDICK, :

Defendant . :

INDICTMENT

77 Cr. 247 (MEF)

-----x
The Grand Jury charges;

On or about the 8th day of February, 1977,
in the Southern District of New York,

ROTHWELL REDDICK

the defendant , did unlawfully, wilfully and
knowingly have in his possession the contents
of a certain check-letter addressed to:

J A GUISCHARD
% CRUSE 5251 W 152 St.
A3 NY NY 10031

which had been stolen, taken, embezzled and
abstracted from and out of an authorized depository for
mail matter and from a letter and mail carrier
knowing the same to have been stolen, taken,
embezzled and abstracted.

(Title 18, United States Code, Section 1708.)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

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THE CLERK: His Honor is about to charge the jury. Those spectators desiring to leave the courtroom will do so now. During the charge by the Court, all spectators will remain seated. No one will be permitted to leave the courtroom.

THE COURT: All right, ladies and gentlemen. It has not been a long trial, but you were reminded, and you didn't have to be reminded, that your assignment at this point is a matter of conscience.

It is a criminal case. It is a matter in which the defendant has an obviously deep interest, in which the people who represent the government, the prosecution, have a deep interest, and, of course, you, as the representatives of the community and the judges of the facts have a deep interest and a solemn responsibility.

You are the judges, as I told you, and I told you, and repeat, that is not an expression, it is simply a fact. You are to seek the truth. You are to seek it, as I told you a couple of days ago, from the evidence you heard in this courtroom and nothing else.

You will remember that the indictment isn't

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2 evidence, it's simply an accusation.

3 The things counsel have said to you, important
4 for their purposes, none of those things are evidence.
5 The evidence is simply the testimony, the exhibits,
6 together with the stipulations, the agreed facts, which
7 eliminate in the end all but one crucial central issue
8 that we will come to very soon.

9 The things that I say to you obviously are
10 not evidence. The things that I am saying to you now
11 are simply, for the most part, rather easy, uncomplicated
12 rules of law that govern this case and some equally
13 straightforward rules that you will follow in your
14 deliberations.

15 You know that it is my task to give those
16 rules to you as they are enjoined on me and not to
17 select and make them up as I go along; and your respons-
18 ibility, which I think presents no major difficulty
19 in a case of this nature, is to take those rules as I
20 convey them to you and apply them faithfully, objectively,
21 coolly, without bias, without prejudice. Apply them to
22 the facts as you find them and render a verdict on that
23 basis.

24 Now, Mr. Reddick, in response to the indict-
25 ment, has pled not guilty, and that means that from that

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2 time on and throughout the burden has been on the govern-
3 ment to prove his guilt beyond a reasonable doubt before
4 he may be convicted.

5 As a corollary of that burden on the govern-
6 ment, it is also the law, as you know and have been
7 reminded, that a defendant is not called upon in a
8 criminal case in our system to prove his innocence.
9 A defendant needn't present evidence of any kind. He
10 comes here, Mr. Reddick has come here, presumed to be
11 innocent. That expression, as you have heard, presump-
12 tion of innocence, is basic in our law. It has been
13 with Mr. Reddick throughout; it will be in his favor
14 when you go to the jury room. The presumption is enough
15 in itself to require you to acquit him unless in the
16 end you are convinced beyond a reasonable doubt of his
17 guilt.

18 Now, you have all heard many times, both in
19 the last couple of days and before now, the expression
20 "proof beyond a reasonable doubt," which is the statement
21 of the burden of the prosecution in a criminal case in
22 our system of justice. You have to have some sense of
23 what it means as nearly as it can be given in instructions,
24 and I will tell you about that.

25 When we refer in this context to "proof beyond

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2 a reasonable doubt," we mean, to begin with, what the
3 words literally undertake to convey. We mean a doubt
4 that has its basis in reason. It is a doubt that has
5 substance and is not merely shadowy. It is a doubt
6 that has its inception in your collective judgment,
7 your collective wisdom, your collective experience of
8 the world, all applied in your deliberations to the
9 record of evidence in the case before you. It is not
10 an excuse to avoid performing an unpleasant duty. It
11 is not a basis for extending sympathy to any defendant
12 or anyone.

13 A reasonable doubt is the kind of doubt that
14 would cause a prudent person to hesitate before taking
15 action in some matter of importance to himself or herself.

16 Putting that in other words, if you are, as
17 all of us are from time to time, confronted with a
18 decision of significance in your own life and if you
19 proceed objectively and without passion to review the
20 factors that have a rational bearing on that decision
21 and if after that review you find yourself beset by
22 uncertainty and unsure of your judgment, you have the
23 kind of doubt we call a reasonable doubt in this setting.

24 And the converse of that is equally true.
25 If you have such a decision to make and if you engage

1
2 in that kind of review of the pertinent factors and if
3 at the end of that you don't have any uncertainty, any
4 unsureness about your judgment, then you don't have a
5 reasonable doubt.

6 Proof beyond a reasonable doubt does not
7 mean proof beyond any doubt or proof to a positive or
8 mathematical or absolute certainty. If that were its
9 meaning, then nobody could ever be convicted in any trial
10 in a criminal case in our courts, and the reason for
11 that is that trials, as I told you when we first met,
12 are conducted for the resolution of issues of fact and
13 it is in the nature of such issues, and most clearly
14 issues about things in the past, that we have not
15 directly experienced, it is in the nature of such issues
16 they can't be proved to an absolute certainty or beyond
17 any doubt or mathematical certainty. So that is not
18 what we mean when we refer to proof beyond a reasonable
19 doubt.

20 But I will say to you in the end, and I
21 suppose this is the net of these efforts to identify
22 the meaning of that basic principle, that in a criminal
23 case in our court the burden of proof on the prosecution
24 is a very high one and you may convict only if in the
25 end your minds are free of the kind of reservation, the

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2 kind of uncertainty I have attempted to describe to you
3 in talking about this subject.

4 Now, with those principles in view, let's
5 come to the charge in this case, the elements of that
6 offense, as we call them, and, finally, the key,
7 ultimate, central, single issue, the one as to the
8 defendant's knowledge, that you will have to resolve in
9 reaching a verdict.

10 All indictments in the federal court, and
11 by now I guess in all the states or substantially all
12 the states, all criminal charges start with statutes,
13 legislative enactments of Congress or state legislatures.
14 We don't have any common law crimes as we used to,
15 crimes that were defined as well as enforced, proceeded
16 against, by the judges.

17 The alleged crime in this case is a violation
18 of a section of the United States Code which you don't
19 have to memorize but I will mention it to you, Section
20 1708 of Title 18, and that makes it a federal crime
21 to possess things that have been stolen from the mail
22 with knowledge that those things have been stolen from
23 somewhere, not necessarily knowledge that they have been
24 stolen from the mail.

25 Now, under that statute, this indictment is

1 laid, as lawyers say, and it is very brief. I will read
2 you its key words. It says:

3 "The grand jury charges on or about the 8th
4 day of February, 1977, in the Southern District of New
5 York" -- which includes Manhattan, the Bronx -- "Rothwell
6 Reddick, the defendant, did unlawfully, wilfully and
7 knowingly have in his possession the contents of a
8 certain check-letter addressed to J. A. Guischarde" --
9 and it gives his address -- "which had been stolen from
10 and out of an authorized depository for mail matter,
11 knowing the same to have been stolen."

12 Now, in order to justify a conviction in a
13 case involving such an accusation, the government is
14 required to establish, or there must be in some way
15 established, each and every one of four essential
16 elements, and though, as I have said two or three times
17 and as you know from the summations and from hearing
18 the evidence, you are seriously concerned with only one
19 of them, I will read all four of them so the charge may
20 be complete. Those elements are as follows:

21 First, that the check-letter to which the
22 indictment in this case refers was in fact deposited
23 in the mail. The reason you are not worried about that,
24 very simply, is it was stipulated there was such a
25

mailing.

Second, that the check-letter was stolen from the mail. And I will say a word about that, but that really is not disputed, and you may recall that yesterday Mr. Thau stated it was conceded in the circumstances of this case.

The third essential element is that after the stealing at some time the defendant had the contents of that check-letter in his possession. Again not an issue about which you need to worry. It is stipulated and the testimony on both sides makes clear that at times about which you have heard the check-letter to Mr. Guischard was in Mr. Reddick's possession.

The fourth essential element is the heart of the matter, and that is the requirement of proof beyond a reasonable doubt that the defendant, when he had that letter in his possession, knew that it had been stolen.

As I have mentioned to you, it is not necessary that he have had knowledge that it had been stolen from the mail. This element simply requires proof beyond a reasonable doubt that he knew of the stolen character of that check-letter from wherever he knew it had been stolen.

1
2 Now, again, the first element, the mailing,
3 is stipulated. As to whether the check-letter had in
4 fact been stolen, I have mentioned to you that it is
5 conceded explicitly that it had been stolen. But if
6 you were to entertain any doubt about that, and all of
7 this is for your judgment in the end and you must be
8 satisfied in the end, let me say to you that there
9 are some simple rules of law, as they are thought to be,
10 but mainly they are simply rules of common sense that
11 govern this subject of stealing from the mail.

12 I will instruct you that if a letter has
13 been properly mailed and if that letter is never
14 received by the addressee but instead turns up in the
15 hands of somebody who is a stranger to the sender, a
16 jury is permitted to find from those circumstances
17 that the letter had been stolen from the mail, provided
18 that the surrounding circumstances support that conclusion
19 beyond a reasonable doubt and provided there is no other
20 explanation offered or suggested for that possession
21 by a person who is or was a stranger to the addressee.

22 So whether or not it is conceded, you will
23 be permitted to make that kind of inference. You would
24 not be required to make it, but it is under the law and
25 I guess under ordinar experience a permissible kind of

inference.

The third element, to be repetitious, is that the letter, the check-letter, was possessed by the defendant. That is also not disputed.

The critical element is did the defendant, at the critical time with which you are concerned, possess that letter wilfully and knowingly, wilfully and knowingly in the sense that he knew it had been stolen.

I repeat, he doesn't have to have known it was stolen from the mail, but he must have known, in order to establish the offense, you must be satisfied beyond a reasonable doubt that he knew it had been stolen from somewhere.

Now, if the jury finds beyond a reasonable doubt that the defendant had possession of mail and if the jury is persuaded that the mail in the defendant's possession had been stolen a short while before, the law permits you to infer, though it doesn't require you to infer, that the defendant knew the letter had been stolen, unless the circumstances surrounding his possession satisfactorily explain that possession on some other basis.

Now, I am not going to repeat the evidence

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to you. You heard it in a relatively brief period of time and you have heard summations summarizing it again and arguing what you should or should not find from it, and you know that the basic controversy centers on the question whether Mr. Reddick acquired that check-letter in circumstances that justify the absence of any belief on his part that it had been stolen and whether, as he asserts, though he has no burden of proof, but that is the way the issue has been put, whether his knowledge that it had been stolen came only later at a point when, in effect, he gave up possession of it, having been apprized of that situation.

Now, if you believe that the defendant, who admits he acquired possession of the letter, acquired it without knowledge that it had been stolen, or, to put it more accurately, if you are not convinced beyond a reasonable doubt that he had knowledge of the stolen character of the check-letter when he acquired it, the development of the facts in this case calls upon you to trace the brief history of the 7th and 8th of February to consider the state of his knowledge through the latter day to the point of his arrest.

If you are persuaded that at some point Mr. Reddick became aware, acquired knowledge, that the

1 letter had been stolen, you may convict him only if you
2 are convinced beyond a reasonable doubt that after he
3 had that knowledge, whenever he acquired it, he with-
4 held the letter from its rightful owner, demanding the
5 payment of money from Mr. Guischarde as a condition for
6 relinquishing possession of it, turning it over to Mr.
7 Guischarde.

8
9 I am simply pointing you at that issue. I
10 think without my instructing you on it you would be
11 aware that that's the key to the matter however it is
12 phrased. Did he, knowing that the letter was stolen
13 at some point, withhold it or continue to withhold it,
14 demanding payment of money as a condition of returning
15 it to Mr. Guischarde?

16 If you are convinced of that beyond a reason-
17 able doubt, you may convict; otherwise you should acquit.

18 Now, since knowledge is the heart of the
19 problem here, generalities about the meaning of know-
20 ledge and the law are not terribly useful, but I will
21 give you a few of the general propositions, very simple
22 ones, that are stated to juries in instructions on this
23 kind of question as a regular matter.

24 The indictment, as I read it to you, charges
25 that the defendant had possession of the letter knowingly

1 and wilfully. Those words in general -- I have talked
2 to you, I think more importantly, about their specific
3 significance to you in this case -- those words in
4 general describe criminal intent and they appear regularly
5 in indictments. So they are key words in most criminal
6 cases with us. But they are not very abstruse. We
7 say somebody acts knowingly and wilfully if he acts
8 purposely, deliberately, aware of wht he is doing,
9 aware of the circumstances in which he is acting, and
10 not by accident or mistake or in ignorance or as a
11 result of negligence.
12

13 And that, with specific reference to the
14 question of knowledge of the stolen character of that
15 check-letter, is the essence of your concern and will
16 be when you go into the jury room.

17 And knowledge, state of mind, those things
18 are questions of fact. Some lawyer's cliché says
19 they are questions of fact like the question as to the
20 state of somebody's digestion. In both kinds of questions,
21 as with many other questions in life and in the courthouse,
22 a reliable, competent answer requires commonly that we
23 resort to circumstantial evidence.

24 They are both subjects on which we can have
25 direct evidence. Somebody can tell you the state of his

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2 or her digestion and somebody can tell you the state of
3 his or her knowledge. You have direct evidence on this
4 subject in this case because Mr. Reddick has taken the
5 witness stand and has told you what he knew and did not
6 know at the vital times in the case. You will, of
7 course, consider and weigh that testimony.

8 Along with it, as you commonly do in the
9 everyday affairs of your life, you will consider the
10 circumstantial evidence from which you are permitted to
11 draw inferences as to the state of Mr. Reddick's
12 knowledge and intent at the critical time.

13 And how do you do that? How do you decide
14 whether somebody is acting with knowledge or with intent
15 of one kind or another? Well, you consider all the cir-
16 cumstances, and that's all we mean by reference to cir-
17 cumstantial evidence. You consider the person, you
18 consider the surrounding conditions and events in
19 which the conduct occurred. You consider his ability
20 to know and understand the realities of which he is
21 claimed to have had knowledge. You consider what he and
22 other people said and did on particular occasions. In
23 short, you consider the whole picture as you do in lots
24 of other affairs. You take into account all the cir-
25 cumstantial as well as the direct evidence in deciding

1 your key question as to whether at the material times
2 Mr. Reddick had knowledge that that check-letter had
3 been stolen.
4

5 I promised you, and I will keep the promise,
6 that I would not burden you with another summary of the
7 evidence. I will not be reviewing the evidence. If
8 I have mentioned little scraps of it, I am sure you
9 understand it is only to attempt to formulate the issue
10 that you are to decide, not to give you a balanced
11 summary or anything approaching that, which I think we
12 all agree is unnecessary.

13 I am going to comment very briefly on a
14 couple of aspects of the evidence to give you some
15 thoughts that are in the nature of rules of law but
16 again are not very recondite or involved rules. They
17 are thoughts, however, that you should keep in mind
18 when you go to consider the evidence because they are
19 rules concerning the limits on or the mode in which
20 evidence or lack of evidence is to be considered by
21 the jury.

22 First, you have heard evidence of a so-called
23 similar act. You have evidence of the check-letter
24 to Mrs. Buttone and, of course, you heard her testimony
25 about the events relating to that check-letter and her

1 acquisition of it from Mr. Reddick.

2
3 You have heard Mr. Reddick's testimony on
4 that as well, and you are aware of certain conflicts
5 and those will be among the things you will consider
6 in deciding the whole case.

7 But let me remind you, and you know that,
8 I am sure, that Mr. Reddick is not on trial with respect
9 to that Buttone check letter. That evidence was per-
10 mitted to be presented in this case on the government's
11 contention that it is probative of the state of Mr.
12 Reddick's intent and the state of his knowledge with
13 respect to the matter for which he is on trial, that
14 it is probative on the subject of intent and knowledge
15 with respect to the Guischard letter.

16 I simply instruct you that that's the only
17 reason for which it has been admitted into this record
18 and you are to consider it with that limitation in mind.

19 Then you heard arguments yesterday and today
20 on both sides about witnesses or possible witnesses
21 that you didn't hear. Of course, you have heard witnesses
22 in this case on both sides and it is up to you to
23 decide -- you may in your wisdom decide -- that in the
24 end your best course may be to cope with and draw
25 inferences from the evidence you did hear and perhaps

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2 devote relatively little or no attention to what you
3 might have heard or might not have heard from people
4 you didn't hear. But the arguments are made and they
5 are before you for your consideration about the
6 witnesses you didn't hear, and I will very briefly
7 tell you a couple of things about that subject that
8 you can take into account in dealing with it.

9 First, I will tell you - probably you know -
10 that in a criminal case in the federal court both sides
11 have the right to invoke the subpoena power of the
12 court. Both sides have the right to subpoena witnesses
13 from anywhere in the country. Both sides can get out
14 a federal court subpoena which orders a person to come
15 here and give testimony.

16 With respect to any person who might or
17 could have been a witness where neither side called
18 that person, it is within your province, as the always
19 sovereign judges of the facts, to infer that the testi-
20 mony of that witness would or might have been unfavorable
21 to the government or to the defendant or to both of
22 them or to neither of them or, in judging the whole
23 picture, the availability or possible availability of
24 these witnesses, the question of which side knew of
25 them and might conceivably have located them, the question

1 of whether it was necessary or desirable to call them,
2 considering all the factors it is within your province
3 to decide, if you do so decide, that you will draw
4 no inference of any kind from the failure of somebody
5 to appear here as a witness.
6

7 If and when you address yourself to this
8 subject, you will bear in mind, as I have told you
9 more than once, that in a criminal case a defendant
10 doesn't have any duty to call any witnesses, and you
11 will bear in mind that there is no duty on either side
12 to call a witness or witnesses whose testimony would be
13 merely cumulative of testimony already given as part of
14 the evidence before you.

15 Now, all of this, the witnesses you heard,
16 the witnesses you might have heard and didn't hear,
17 leads to another standard and very obvious subject of
18 instructions to juries, the subject of credibility.

19 You will realize, having heard the witnesses,
20 that there are at various points important conflicts
21 in the testimony. One of your tasks and perhaps the
22 crux of your job will be to resolve those conflicts,
23 to decide issues of credibility.

24 Your reliance is on the witnesses primarily
25 for your efforts to reconstruct the reality which will

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2 lead to a decision in this case, and so you must along
3 the way consider the conflict between the witnesses
4 presented here by the government and the testimony of
5 Mr. Reddick at the several points, several of them
6 crucial, where the testimony is in conflict.

7 There is nothing, though it is a standard
8 item in jury instructions, there is nothing especially
9 technical or legalistic about this matter of credibility.
10 In our system, our system of jury trial, it proceeds
11 on the premise that credibility is not a legal specialty,
12 that people trained in the law have no particular,
13 unique insight or skill in deciding questions of
14 credibility. And so, administering that system, we
15 bring to the courthouse people like you who are lay
16 people so far as the law is concerned with the expecta-
17 tion, which is realized over years, that you will bring
18 to this matter of judging credibility your collective
19 common sense, your collective experience of how the
20 world works and how people function, your collective
21 intelligence, and apply those assets to this vital task
22 of deciding who told you the truth and to what extent.

23 You will be reviewing the few witnesses
24 you have heard and you will be asking yourself how
25 each of them struck you. Did the witness appear to be

1 candid, straightforward, forthright? How did the testi-
2 mony on direct compare with the testimony on cross?
3 Was the witness consistent in his or her own testimony
4 or self-contradictory? How does the testimony stack
5 up against other testimony you have heard? How plausible
6 is the story as it was given to you?
7

8 We all know that life recurrently produces
9 implausible events. At the same time we all know,
10 having had experience with the necessity for gauging
11 a story against its plausibility in light of our know-
12 ledge about how the world works, in light of our know-
13 ledge as to the relative likelihood or unlikelihood of
14 particular events having happened in the way that they
15 have been described by a particular witness.

16 You will consider the testimony, in short,
17 once again, in light of all the pertinent circum-
18 stances: the other testimony and the setting of events
19 to which the testimony related.

20 There are a number of ways that a witness
21 can be discredited or impeached, as the lawyers say,
22 and you have heard efforts of that nature in this case.

23 A witness may be impeached by evidence that
24 at some time in the past the witness has been convicted
25 of serious crime. You have heard evidence of prior

1 convictions of Mr. Reddick in this case, and I will
2 instruct you that that evidence was allowed in this
3 record only for that purpose, only for the purpose of
4 attempting to discredit him as a witness. The evidence
5 of prior convictions may not be taken beyond that
6 purpose of impeachment as proof of guilt in this particu-
7 lar case.
8

9 Now, obviously, the fact that somebody has
10 prior convictions doesn't make him an incredible witness.
11 If it did, we wouldn't allow anybody with prior convic-
12 tions to testify. I mention that and it is permitted
13 to be employed in a trial simply as one of an array of
14 factors that a trier of facts, a jury, is permitted and
15 expected to take into account in assessing credibility.
16

17 You may, you would, whether I mention it
18 to you or not, I am sure, consider the interest of a
19 particular witness in the outcome of the case in
20 appraising the credibility of the witness.

21 A defendant in a criminal case has a deep
22 and obvious interest in the outcome of that case. You
23 may take that into account in judging the credibility
24 of Mr. Reddick.

25 Law enforcement people have an interest
commonly in the outcome of the cases in which they testify.

1
2 They have an interest in vindicating the correctness
3 of their own actions and beliefs and views in the per-
4 formance of their official duties. I know you will
5 take that into account in considering the testimony
6 in this case.

7 You will consider what interest anybody
8 else may have and how it may or could have affected
9 the testimony you heard.

10 Now, again, and again very obviously, the
11 fact that somebody has an interest in the outcome doesn't
12 mean that the person will violate the oath, commit per-
13 jury, as a witness in the case. It is, to repeat,
14 simply a factor which I will remind you that you may
15 consider in considering credibility.

16 Now, if you are convinced that any witness
17 has wilfully given you false testimony about any material
18 fact in the case, your prerogatives as jurors entitles
19 you, if your wisdom so dictates, to disregard all
20 the testimony of that witness, or you may consider
21 such parts of that witness' testimony as seem to you
22 to be reliable and helpful in your task of searching
23 out the truth.

24 Now, those things that I have mentioned are
25 not all the matters which may have a bearing on credibility.

1 and you will not be displeased, I trust, to know that
2 I am not going to try to list all the matters. I
3 simply confide that question to you to bring to bear
4 on it all the things that have occurred to you as you
5 sat in the jury box and observed those witnesses and
6 all the things that your several viewpoints about such
7 matters lead you to believe may be pertinent and help-
8 ful in the deliberations to a rational and collective
9 decision.
10

11 Now, when you go to embark on those delibera-
12 tions in a little while, there will, under our system,
13 be twelve of you in the jury room, and I will excuse
14 our two alternates, and the purpose of that is again
15 a very obvious matter but one that we commonly mention.
16 The purpose is to have you reason together. That means
17 that it isn't merely a privilege to offer your point
18 of view, it is part of your obligation to contribute
19 your individual point of view to those collective
20 efforts.

21 By the same token, if it is to work, each
22 of you will, I am sure, go to the jury room prepared
23 to listen patiently and attentively to the view of
24 your fellow jurors. If you have a position on any
25 question at some point in the deliberations and you are

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2 persuaded by the discussion that it was incorrect, you
3 won't hesitate to change. On the other hand, if you
4 have a position and you hold it in good conscience,
5 you are not expected or, indeed, permitted to change
6 it simply because you happen to be outnumbered at any
7 particular time in the jury's work.

8 I think you know, but I remind you, that in
9 order to reach a verdict either way you must be
10 unanimous, but the unanimous verdict of a jury should
11 reflect the individual judgment and the individual con-
12 science of each of the people comprising that jury.

13 It has been a very short trial and I don't
14 know that you will need any repetitions, but if, when
15 you deliberate, you find you would like to hear some
16 part of the testimony again, send us a note about that
17 through your forelady, Miss Fillet, and we will undertake
18 to find it with the reporter and have it read to you.

19 If you need to see any of the exhibits, let
20 us know about that and we will send them to you.

21 In fact, is there any objection if we just
22 bundle up the exhibits and send them in to the jury?

23 MS. COTE: No objection from the government,
24 your Honor.

25 MR. THAU: No objection.

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2 THE COURT: We will collect those that have
3 been received in evidence and shortly after you retire
4 we will send them in.

5 I enjoin upon Miss Fillet, who has all these
6 responsibilities, the safekeeping of them and to give
7 them back.

8 If -- again I don't imagine this will be
9 necessary, but if you feel the need to hear any part of
10 the instructions repeated, send us a note about that
11 and we will do that.

12 If at any time during your deliberations
13 you are writing a note and you are at that point divided
14 in your views, don't report to us or to anybody how the
15 vote stands. That is a private question for the jury
16 and we are not to intrude on that or to be informed
17 about it.

18 That's all, I think, of the instructions
19 you need except that I want to see whether counsel
20 have any exceptions, any other or different things
21 they wish to be heard on. If so, let's come to the
22 side bar.

23 (At the side bar.)

24 THE COURT: Yes, Ms. Cote?

25 MS. COTE: Can we confer for just one moment?

1
2 THE COURT: Yes.

3 (Pause.)

4 MS. NEIMAN: Your Honor, I may not have
5 taken all parts of the charge into consideration, but
6 when your Honor framed the issue for the jury, your
7 Honor did it I think on the assumption that the jury
8 should find that Mr. Reddick got the check from someone
9 else, that there came a point in time on the 7th when
10 he learned from neighbors, or on the 8th from Mr.
11 Guischard, that it was stolen and the question is whether
12 at that point in time he persisted in asking for money
13 for the check.

14 I think that that leaves out the major theory
15 which the evidence supports, that he knew it was stolen
16 from the outset, and focusing the jury's attention on
17 one issue which wasn't the government's major contention
18 I think puts it in an unfair light.

19 I think basically our contention is that
20 he knew it was stolen from the minute he got it, when-
21 ever it is he got it, whether he got it himself or from
22 others, and they come to the issue of when he knew it
23 was stolen only if they decide he got it in the circum-
24 stances he says he got it.

25 MR. THAU: I listened attentively to the

1 Court's charge. I think you covered all the possibilities,
2 including the possibility that he knew that it was stolen
3 as very soon as he got it. Ms. Neiman seems overly con-
4 cerned that you might have stressed to the jury that
5 your private thoughts were that they should find he knew it
6 was stolen only later on. You did no such thing. You
7 covered that he knew immediately or that he learned it
8 some time before his arrest, and that is quite sufficient
9 on that point, I think.

10
11 THE COURT: Your theory of the case is that
12 he learned that it was stolen only when he talked to
13 Guischart and at that point promptly delivered it,
14 didn't hold it for ransom, he hadn't heard it before?

15 MR. THAU: Yes.

16 THE COURT: I will give it to them that way.
17 I will give it to them as you are standing here, and
18 then you will correct it again.

19 MR. THAU: I wasn't seeking a correction.

20 THE COURT: I think Ms. Neiman for twice may
21 have a point. I hope this doesn't happen too often.

22 MS. NEIMAN: Thrice.

23 THE COURT: Don't quibble.

24 Any other exceptions?

25 MR. THAU: No, I have none.

(In open court.)

THE COURT: Let me just say based on the educational conversation I have just had, since it is the core of what you are going to be concerned with it might not be unhelpful to restate the contentions on this question of knowledge, and I will give that briefly and I hope in a balanced way.

I think it is fair to say, and you have heard, that the government's theory is that you should find the defendant knew the check, the Guischard check, was stolen from the outset of his possession of it. In part, they have undertaken to have you infer that he himself stole it, but that if he acquired it from anybody else, he acquired it in circumstances that you should find led him to know that it was a stolen check.

Thereafter, the government contends that when he encountered Guischard he continued wilfully and knowingly to possess that check, depriving the known owner of its possession and holding it in the lyrical way both lawyers have described it, holding it for ransom, requiring Guischard to give him money as a condition for delivering it.

The opposing contention is that Mr. Reddick acquired the check in the fashion he described to you,

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2 acquired it from a man named James, whose last name he
3 didn't know, as collateral or security for a \$20 loan;
4 that he did not then know the check had been stolen
5 and didn't have any compelling reason to believe it
6 had been stolen; that he became aware or convinced
7 that it had been stolen only on the occasion of his
8 direct encounter with Mr. Guischarde and that at that
9 point he did not hold it for ransom but was ready
10 promptly to deliver it without any further condition
11 to Mr. Guischarde, whom he now recognized as its proper
12 owner.

13 That formulates the two positions, and all
14 I will say in addition is that the burden is on the
15 government and you may convict only if the government's
16 theory that the check was possessed with knowledge that
17 it had been stolen at some point along the line, you
18 may convict only if the government's theory has been
19 proved to your satisfaction beyond a reasonable doubt.

20 Let me see if anybody wants anything added
21 or subtracted from that.

22 (At side bar.)

23 THE COURT: Anything else?

24 MS. NEIMAN: No.

25 MR. HAD: No.

(In open court.)

THE COURT: This is a simple case and our procedure is not complicated. You will return a verdict orally through the foreperson in the courtroom and the verdict will be in one or two words: guilty or not guilty.

At this point, since the first twelve of our jurors have survived and appear to be fit and in condition to deliberate, I will excuse Mrs. Rubin and Mr. O'Connor.

I won't keep you with a long speech, but I will thank you for your assistance and your participation in this.

Mr. Swanciger tells me if you go to Room 109 they may have still other work for you to do.

Now if we may have the marshal sworn.

(Marshal sworn.)

(At 11:03 A.M., the jury retired to commence their deliberations.)

THE COURT: See you later on.

(Recess.)

(Court Exhibit 1 was marked.)

(At 12⁴⁵ P.M., the jury returned to the courtroom.)

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2 THE COURT: O.K., Mr. Wolf will read you
3 the testimony you requested.

4 (Record read.)

5 THE COURT: I guess it's about lunchtime.
6 Then when you come back, ladies and gentlemen, will
7 you resume your deliberations.

8 (At 1:07 P.M. the jury left the courtroom.)

9 (Court's Exhibit 2 was marked.)

10 (At 3:58 P.M. the following occurred in
11 open court, with the jury not present.)

12 THE COURT: Mr. Swanciger has shown you the
13 note?

14 MS. COTE: Yes.

15 MR. THAU: Yes.

16 THE COURT: There are two questions. One
17 is whether we should keep the jury overnight. Who
18 has a view about that?

19 MS. COTE: The government would request the
20 jury be kept overnight.

21 THE COURT: Mr. Thau?

22 MR. THAU: I have no objection to that.
23 Well, let me preface it by asking you a question if I
24 might.

25 In the event you are required to keep them

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2 overnight, what time would you release them tonight?

3 THE COURT: We can negotiate that with the
4 jury.

5 Secondly, I think -- I don't know whether
6 George wants to put this on the record or not. It
7 might get too gory.

8 I have to be in mi town at 5:30 to get a root
9 pulled. It doesn't hurt a lot. I am going to go because
10 it is very hard to get my dentist to pull roots out.

11 I think I might as well tell the jury we
12 will be unavailable from 5:00 to 7:00 and they will have
13 to work without us. I don't want to generate too much
14 sympathy. I will just tell them that is the way it is.
15 If they haven't reached a verdict by 7:00 when we get
16 back to them, they will go out to dinner at that time
17 and come back and stay until about 11:00 or so.

18 MR. THAU: Your Honor, if we will stay that
19 late, then with respect to whether they ought to be
20 kept overnight, it would be my feeling by 11:00, that
21 would be enough time to reach a verdict in this simple
22 a case. I think any further deliberations would be
23 coercive and I would at that time ask for a mistrial.

24 THE COURT: All right. When you get around
25 to it, you ask.

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2 I will give them a choice, though, of going
3 to their hotel at 7:00 or 11:00 and we will resolve that
4 right now.

5 MR. THAU: Since we haven't covered this
6 business of hotel, that strikes me as a bit coercive
7 to jurors who were not advised in the event if it were
8 two days deliberations they would be sequestered. None
9 of them have toothbrushes and such things. I would have
10 no objection if they returned home and came back tomorrow.

11 MS. COTE: Your Honor, the government has
12 no objection to allowing them to go home at approximately
13 11:00 o'clock, or whatever time you agree to with the
14 jury.

15 THE COURT: You mean 11:00 o'clock to have
16 a mistrial or come back tomorrow?

17 MS. COTE: To come back tomorrow.

18 THE COURT: I am not going to send them home
19 from here at 11:00 o'clock. They will go through this
20 minefield and only three or four will survive. Only
21 lawyers and judges go home at that time.

22 It is not helpful.

23 Do you want to agree with Mr. Thau?

24 MS. COTE: No.

25 THE COURT: Do you think something will happen

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2 between 7:00 and 11:00? I don't really think so.

3 MR. THAU: Perhaps I misspoke. I wasn't
4 arguing in favor of letting them go home at 7:00. I
5 said if you kept them until 11:00 --

6 THE COURT: I heard what you said, but
7 alternatively you said they don't have a toothbrush.
8 I am trying to cover all the bases.

9 MS. COTE: Your Honor, the government would
10 like to have them stay for at least a little time after
11 you would be returning at 7:00 so if they have any
12 applications to make to you it can be made at that time.

13 MR. THAU: I agree.

14 THE COURT: Let's have the jury out. We won't
15 keep them overnight.

16 (Jury enters courtroom.)

17 THE COURT: We have your note, ladies and
18 gentlemen, which says you have not been able to come to
19 a decision and asks what is the procedure.

20 Let me describe the procedure at a little
21 length and refer to a few centuries of history and remind
22 you you have only been deliberating a little while.
23 There are twelve of you. So it is expected it will take
24 some time. If we gave up on jury deliberations in
25 relatively brief cases of this kind after so brief a

1 period, the institution of jury trial would have been
2 dead long ago. Those of us who work in the courthouse
3 encounter regularly juries who feel they are in a state
4 of disagreement that they will be unable to resolve,
5 and we repeatedly experience resolution of those matters
6 after a while.
7

8 So the short of this question is that I am
9 going to be required to ask you to try some more, to
10 resume your deliberations, and as long as you are out
11 here, let me tell you about your schedule and a small
12 wrinkle or obstruction in it.

13 For reasons that I don't need to bother you
14 with, we will be unavailable to you from about 5:00
15 o'clock to about somewhere approaching 7:00 o'clock.
16 If we haven't heard from you by 5:00, I am going to have
17 to ask you, therefore, to proceed with your deliberations,
18 understanding that through those two hours or so if you
19 send out notes we will probably be unable to respond
20 to them; but as soon as we are available to you, if any
21 notes have accumulated, we will consider them and react
22 to them in whatever way is necessary.

23 Then the plan would be that somewhere shortly
24 after 7:00 o'clock, if you have not reached a verdict,
25 we will suspend for the day and have you return at

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2 about 9:00 tomorrow morning revived to resume your con-
3 sideration of this case.

4 I told you earlier, and I repeat, this is a
5 matter for everybody's conscience and judgment, but
6 you will also understand that the end and function of
7 a jury trial is a jury verdict. You have to view this as
8 a task the object of which is a decision in the interest
9 of everybody and not indecision and to plan to do the
10 whole business over again.

11 I am sure you will approach it in that spirit
12 and do your best to air and resolve your disagreement.

13 So if you have any problems before 5:00
14 o'clock we will try to get to you. Otherwise you will
15 understand there will be that delay, during which time
16 please work ahead, as I am sure you will, as earnestly
17 as you can.

18 THE FORELADY: May I ask a question?

19 THE COURT: Yes.

20 THE FORELADY: Is there any way of getting
21 a phone call to some people who might be waiting?

22 THE COURT: Yes. If you give the marshal
23 the name and number of the person or persons you each
24 want to call and your message, he will take care of it
25 for you. O.K.?

(At 4:07 P.M., the jury retired to continue their deliberations.)

THE COURT: O.K. Having neither heard nor given any opportunity for any objection, if I haven't seen you before 5:00 o'clock I will slip away quietly and you can flip a coin for which of you will take over the talking from 7:00 to 7:30 because I will be all numbed.

MR. THAU: I wish you good luck.

THE COURT: I was hoping you would say something like that. I will see you later.

(Recess.)

(At 7:05 P.M., in open court, jury not present.)

THE COURT: Before we get the jury in, Mr. Thau earlier raised a point for which I have sympathy. I always think it undesirable and unkind to inform a jury on the evening of any particular day, I suppose especially Friday, that they are going to have to stay with us overnight when they haven't been warned that they should bring a toothbrush.

On the other hand, the positions that lawyers take sometimes depend on the time of day when the issue arises, and so on, and I can understand that to tell the jury now that they ought to bring a toothbrush in case

1 they have to stay tomorrow night might generate an objec-
2 tion by counsel at this point. So I think I want an
3 election made by Mr. Thau on that subject, without pre-
4 dicting whether we will keep the jury tomorrow night and
5 through Saturday. I want the defendant and the govern-
6 ment to take a position as to whether in the event it
7 does turn out we are going to keep them, which will
8 depend on how the situation looks to me in the course
9 of tomorrow, we ought to do the humane thing and tell
10 them tonight about that possibility or whether it is
11 preferred that we don't and risk their unhappiness
12 tomorrow night if we have to tell them they are staying.

13 MS. COTE: There is a possibility you would
14 sequester them for Friday evening?

15 THE COURT: Yes, there is a possibility.
16 I don't know whether I will.

17 MS. COTE: The government would not recommend
18 sequestration in this case. However, if you are going
19 to consider sequestration for tomorrow evening, then I
20 would request you do mention that fact to them tonight.

21 THE COURT: Mr. Thau.

22 MR. THAU: I would oppose both sequestration
23 and, of course, an advice to them that you would, which
24 in a sense doesn't make any sense.
25

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2 THE COURT: Just answer my question. I
3 know you oppose everything.

4 MR. THAU: No, I don't.

5 THE COURT: I want you to answer my specific
6 question.

7 MR. THAU: I will.

8 THE COURT: Do it now.

9 MR. THAU: I am opposed to it for this reason:
10 since they appear deadlocked, although perhaps not
11 hopelessly, to suggest to them that they will be kept
12 yet over another night might have a wrong effect. They
13 have now deliberated as long as it has taken the evidence
14 to come out.

15 THE COURT: I know your position. Don't
16 debate it. If tomorrow night I conclude that they should
17 be kept over, it will not be one ground of your objection
18 that I didn't warn them to bring a toothbrush?

19 MR. THAU: That's right.

20 THE COURT: If you want me to warn them, I
21 will warn them.

22 MR. THAU: No.

23 THE COURT: As long as we understand each
24 other. I go along with your position and I won't warn
25 them, and I hope I don't have to keep them, but that

remains to be seen.

So we will have them and all of us back at 9:00 o'clock tomorrow morning.

(Jury enters courtroom.)

THE COURT: We have your note, ladies and gentlemen, informing us that it was 7:00 o'clock and asking what's the procedure.

I want to reassure you we knew it was 7:00 o'clock actually. I will tell you the procedure.

The procedure is we are going to excuse you at this time, and I will have to instruct you to come back tomorrow morning at 9:00 o'clock. When you come back, go to the jury room. We won't have opening ceremonies, a school song or anything. But do not begin to deliberate until you are all there, and when you are all there, please, when you are fresh and perhaps better able to move toward agreement, proceed to consider the case. When you are all there, please let Mr. Swanciger know so that all of us will know and I trust we will not cause you any of these long interruptions. Tomorrow if you have any questions, let us know and we will get back to you as promptly as we can.

Don't discuss the case with other people either. Plan to forget about it overnight and come

back tomorrow morning and discuss it fully.

We will see you some time tomorrow. Have a good night.

(Jury leaves courtroom.)

THE COURT: You want to mark this, please.

(Court Exhibit 3 marked.)

THE COURT: I think the jury has the exhibits.

THE COURT: Ed, collect the exhibits, please.

MS. COTE: Your Honor, I have an application to make. I am going to be arguing before the Court of Appeals tomorrow morning. Can I let your clerk know a phone number where he can reach me?

THE COURT: You say you have an argument before the Court of Appeals?

MS. COTE: Yes.

THE COURT: No, what you must do is get Ms. Neiman or somebody to stand by for you. We are not going to keep the jury waiting.

MS. COTE: No.

THE COURT: You may let Mr. Swanciger know where he can reach you and/or Ms. Neiman so that as soon as we have a note we can convene and take care of it.

MS. COTE: Thank you.

THE COURT: Anything else, Mr. Thau?

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MR. THAU: No, thank you, your Honor.

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THE COURT: See your tomorrow.

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(Adjournment to 9:00 A.M., June 24, 1977.)

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UNITED STATES OF AMERICA,

-against-

77 Cr. 247

ROTHWELL REDDICK

New York, New York
June 24, 1977

(10:30 A.M., in open court, jury not present.)

THE COURT: You have seen the note?

MS. COTE: Yes, your Honor.

THE COURT: I think the short answer is no.

MR. THAU: I agree with that.

THE COURT: I think they should be told, since they are presumably thinking about something about punishment, if there is a guilty verdict punishment is not their business, it is for the judge, and that involves discretionary things that are not before them.'

Any objection to that?

MS. NEIMAN: I have no objection to that, your Honor.

THE COURT: Of course, there is nothing to stop the jury from saying whatever it likes, but that's why I would add on these other things.

MR. THAU: I would say a cryptic no and if you want to put exclamation points after that, I wouldn't object either.

THE COURT: They say: "Is it possible to give

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a recommendation?"

The literal answer is yes. Nothing stops a jury from saying whatever it likes.

MR. THAU: In this context, "possible" does not really mean possible.

THE COURT: That is why we ought to face the context and tell them what the answer is.

MR. THAU: No.

THE COURT: The answer is: "If what you are thinking about is punishment, that's for the judge."

O.K., I will tell them that, anyhow. I should have told them that when I originally charged them. It might have obviated this question.

Do you have something else?

MS. NEIMAN: If your Honor could add language that it would be a violation of their oaths to consider that and that is a question for your Honor if there is a guilty verdict.

THE COURT: I don't want to tell them what violates their oath. They are supposed to follow instructions. That is why I will tell them about punishment.

MR. THAU: If you tell them punishment is the Court's concern, would you couch that in stern language?

THE COURT: Would you call the jury before Mr.

2 Thau and I lose the healthy relationship we usually have.

3 (Jury enters courtroom.)

4 THE COURT: Good morning.

5 We have your note. I am sorry it took a little
6 while for us to rally around to answer it. Let me remind
7 you it says: "Is it possible to give a recommendation
8 with a verdict?"

9 In the sense that we infer the question implies,
10 the short answer is no. The longer answer is, since
11 one assumes you are speculating about possible problems
12 of punishment, that in our system if there is a guilty
13 verdict the question of sentence is a matter for the judge.
14 It is a matter in the judge's discretion. It embraces
15 factors that are not before the jury in a jury trial, as
16 well as things that are before the jury.

17 So your instruction on that subject usually
18 included in a jury charge or commonly included, but I
19 didn't mention it to you at the outset, is very simply
20 this: that just as the prior question of guilt or innocence
21 under the rules I have given you is for the jury, the
22 question of punishment, if it is ever reached, is for the
23 trial judge. Accordingly, it is your duty not to speculate
24 about possible questions of punishment but to answer, if
25 you can, one way or another, the question that has been

placed before you in your effort to reach a verdict.

That is the long answer to your question, but I think it covers what you need to know about it.

Let me check. Does counsel want to talk about this any more?

MR. THAU: Yes, your Honor.

THE COURT: Come to the side bar.

(At side bar.)

MR. THAU: Your Honor had not used those words in your charge, and for the first time in this trial your Honor spoke of guilt or innocence.

It is my view that the issue is not a finding of either guilt or a finding of innocence. Innocence being presumed, it remains that unless guilt has been shown beyond a reasonable doubt.

At this last hour for the jury to feel they are deciding guilt or innocence I think is prejudicial to this defendant.

THE COURT: What do you want me to say?

MR. THAU: That it is not their function to deliberate on whether the defendant might be innocent but merely whether his alleged guilt has been proven beyond a reasonable doubt.

THE COURT: All right.

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(In open court.)

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THE COURT: I have been reminded that it might be just as well to rephrase the question that has been put to you in very general terms, and I will repeat that your question, which does not relate to punishment at all, is the question whether the defendant has been proved guilty of the charge against him beyond a reasonable doubt.

O.K. Why don't you retire.

(At 10:48 A.M., the jury retired to continue their deliberations.)

BEST COPY AVAILABLE

CERTIFICATE OF SERVICE

October 12 , 1977

I certify that a copy of this [REDACTED] appendix has been mailed to the United States Attorney for the Southern District of New York.

Barry Bassin